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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JONATHAN DAVID SWIHART, Appellant.	2 CA-CR 2010-0136 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083756

Honorable Richard D. Nichols, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Jonathan Swihart appeals from his conviction and sentence for manslaughter. Swihart contends the trial court erred in rejecting his proposed jury

instructions regarding the lesser-included homicide offenses and the instructions the court gave were legally flawed. He also contends the court abused its discretion in denying his motion for a new trial because he did not consent to amend the indictment's charge to include the element of sudden quarrel or heat of passion. He further argues the court abused its discretion by failing to preclude inculpatory evidence the state untimely disclosed. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Swihart's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the night of September 6, 2008, Swihart and his girlfriend N. went to a party where they drank alcohol and smoked marijuana. Upon leaving the party, Swihart and N. began to argue and continued arguing after they arrived back at Swihart's apartment sometime after midnight. They continued to drink alcohol and smoke marijuana and the fight escalated, with each accusing the other of infidelity. N. began turning over furniture and breaking items in Swihart's apartment, and the two began striking each other.

¶3 At some point, N. went into the bathroom and sent Swihart a text saying she was going to kill herself. During the argument, the two exchanged multiple threatening text messages to one another, and N. said she had people "on the way" to kill Swihart. At some point Swihart began walking around the apartment with a shotgun. He also had a handgun in his bedroom.

¶4 N. eventually left the apartment but returned five to ten minutes later and walked to Swihart's bedroom. Swihart's roommate heard one gunshot, and when he emerged from his bedroom he saw N. lying on the floor between Swihart's bedroom and the hallway. Swihart was next to N. "[o]n his knees screaming." N. died of a single gunshot wound to the chest.

¶5 Swihart was charged with first-degree murder. After a five-day jury trial, he was convicted of the lesser-included offense of manslaughter. He was sentenced to a presumptive 10.5-year prison term. Following the jury's verdict, Swihart filed a motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P., which the trial court denied after hearing argument. This appeal followed.

Discussion

Jury Instructions

¶6 Swihart contends the trial court erred in rejecting his proposed instructions for reaching the lesser-included offenses of homicide. He argues the final instructions the court gave were erroneous because "manslaughter by sudden quarrel or heat of passion is not a lesser-included offense of second-degree murder," but the instructions "treat it as though it is." We review de novo whether jury instructions correctly state the law. *State v. Roque*, 213 Ariz. 193, ¶ 138, 141 P.3d 368, 401 (2006).

¶7 Swihart's proposed instructions stated: "If you find the defendant guilty of second-degree murder, you must proceed to consider the lesser offense of 'manslaughter by sudden quarrel or heat of passion.'" In contrast, the instructions given told the jury to

consider the lesser-included offense of manslaughter by sudden quarrel or heat of passion only if it found the defendant not guilty of both first and second-degree murder or if it was unable to agree. The instructions further directed the jury to consider the lesser offense of "manslaughter" if it found the defendant not guilty of manslaughter by sudden quarrel or heat of passion, or if it could not agree.[1] Additionally, the verdict form did not distinguish between the types of manslaughter.

¶8 Ultimately the jury found Swihart not guilty of first and second-degree murder but guilty of manslaughter. Section 13-1103(A), A.R.S., provides multiple ways that "[a] person commits manslaughter," including by "[r]ecklessly causing the death of another person," or by "[c]ommitting second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Swihart contends the instructions used by the court "prevent[ed] the jury from properly considering [manslaughter by sudden quarrel or heat of passion]" by treating it as a lesser-included offense of second-degree murder.

¶9 This court on two prior occasions has addressed a similar argument to the one Swihart presents here, and both times found any error in the instructions did not result in prejudice. *See State v. Eddington*, 226 Ariz. 72, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010); *State v. Garcia*, 220 Ariz. 49, ¶¶ 3, 7, 202 P.3d 514, 515, 516 (App. 2008). We likewise determine that any error in the instructions given here was harmless. The

[1]The instructions given were modeled from *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). *See also State v. Eddington*, 226 Ariz. 72, ¶ 29, 244 P.3d 76, 85 (App. 2010).

error in the instructions given, as recognized by this court and urged on appeal by Swihart, is that a jury, properly following its instructions, "would never reach the issue of adequate provocation in order to find a defendant guilty of manslaughter . . . rather than second-degree murder." *Eddington*, 226 Ariz. 72, ¶ 31, 244 P.3d at 85-86. This is so because the instructions directed the jury to consider sudden quarrel or heat-of-passion manslaughter only if it found the defendant not guilty of first and second-degree murder or if it could not agree. Therefore, a jury finding the defendant guilty of second-degree murder may never consider whether the defendant is instead guilty of heat-of-passion manslaughter even though that offense contains all the elements of second-degree murder plus a different required circumstance. *See* § 13-1103(A)(2); *Peak v. Acuña*, 203 Ariz. 83, ¶ 6, 50 P.3d 833, 834 (2002) (lesser-included offense of manslaughter includes all elements of greater offense of second-degree murder but specifies different circumstance).

¶10 This scenario is irrelevant to Swihart. Swihart's proposed instructions would have required the jury to consider heat-of-passion manslaughter if it found him guilty of second-degree murder. It is this difference in the instructions that Swihart urges on appeal warrants reversal of his conviction and sentence. But the jury did not find Swihart guilty of second-degree murder; thus there is no concern that the jury did not properly consider the lesser-included offense of manslaughter. In contrast, the jury clearly considered the offense of manslaughter and, although we cannot determine of

which type it found him guilty, Swihart has not persuaded us that the distinction is relevant to the overall resolution of his case.

¶11 Swihart also argues a properly instructed jury would not have considered heat-of-passion manslaughter after returning a not guilty verdict on second-degree murder, as the jury did here, and thus it "presumably but erroneously found [him] guilty of [heat-of-passion manslaughter] in violation of his constitutional right to have the jury find each element proven." He contends that "one who is not guilty of second-degree murder simply cannot be guilty of manslaughter by sudden quarrel or heat of passion." But the jury instructions given for heat-of-passion manslaughter included the elements of second-degree murder. Consequently, as we noted also in *Garcia*, 220 Ariz. 49, ¶ 7, 202 P.3d at 516, "[t]he trial court clearly explained that sudden-quarrel or heat-of-passion manslaughter included the elements of second-degree murder." We presume the jury follows the instructions given, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and thus, if it found Swihart guilty of heat-of-passion manslaughter, it necessarily found the elements of second-degree murder proven despite its "not guilty" designation for second-degree murder on the verdict form. Therefore, assuming without deciding the instructions given contain legal flaws, these flaws did not affect the outcome of the case here and thus any error is harmless. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005).

¶12 Swihart also proposed instructions stating: "The state has the burden of proving, beyond a reasonable doubt, that the defendant did not act upon a sudden quarrel

or heat of passion, or that the sudden quarrel or heat of passion did not result from adequate provocation by the person who was killed." The trial court rejected this instruction.

¶13 Swihart notes *Peak* held that whether the defendant acted "upon a sudden quarrel or heat of passion resulting from adequate provocation" is a circumstance required to find heat-of-passion manslaughter. *Peak*, 203 Ariz. 83, ¶ 6, 50 P.3d at 834, *quoting* § 13-1103(A)(2). Without citation to controlling authority, he contends the statute and case law do not identify the party bearing the burden of proving the circumstance, but the burden should fall on the state to prove beyond a reasonable doubt Swihart did not act under that circumstance, and the jury should have been instructed accordingly. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"). Swihart notes this argument "is not directly related" to the remainder of his argument regarding the jury instructions and does not explain how the absence of his requested instruction may have influenced the outcome of his case. *See* A.R.S. § 13-3987 (no error unless defendant's substantial right actually prejudiced). As Swihart concedes, jury unanimity was not required as to the type of manslaughter, and the jury either found Swihart acted upon a sudden quarrel or heat of passion, or it found that circumstance and the elements of second-degree murder not proven, instead concluding he was guilty of reckless manslaughter. *See* § 13-1103(A)(1), (2); *cf. State v. Gomez*, 211 Ariz. 494, n.3, 123 P.3d 1131, 1135 n.3 (2005) (unanimity not required as to theory of first-degree murder). Under the former

scenario, Swihart was not harmed by any failure to disprove mitigating circumstances if the jury found he did act under those circumstances. Under the latter, sudden quarrel or heat of passion is irrelevant to the state's requirement to prove the elements of that offense. Therefore, we do not address further the merits of this argument.

Motion for a New Trial

¶14 Swihart argues the trial court abused its discretion in denying his motion for a new trial because "he did not personally agree to include the additional element of sudden quarrel or heat of passion in an amended indictment." He argues here, as he did in his motion for a new trial, that manslaughter from sudden quarrel or heat of passion is not a lesser-included offense of first or second-degree murder because it contains an additional element, and he cannot be convicted of an offense not included in the offense charged in the indictment. We review a court's denial of a motion for a new trial for an abuse of discretion. *State v. Ruggiero*, 211 Ariz. 262, ¶ 6, 120 P.3d 690, 692 (App. 2005).

¶15 The state argues Swihart's argument is precluded because this issue was raised for the first time in his motion for a new trial. Swihart did not object to the jury instructions on the basis he presents here. Issues that could have been cured at trial but are raised for the first time in a motion for a new trial are not preserved on appeal, *State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010), and we review solely for fundamental, prejudicial error, *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Here, there was no error, let alone fundamental error, in submitting to the jury

instructions regarding heat-of-passion manslaughter without Swihart's consent to amend the indictment, and the trial court did not abuse its discretion in denying the motion for a new trial made on that basis. *See id.* ¶ 23 (to obtain relief under fundamental error review must first prove error).

¶16 A defendant can be convicted of a different offense from that originally charged "only if it is included in the offense charged," or if the defendant consents to an amendment of the charges. *State v. Sanders*, 115 Ariz. 289, 290, 291, 564 P.2d 1256, 1257, 1258 (App. 1977). In general, "[a] lesser-included offense is one that contains all but one of the elements of the greater offense." *Peak*, 203 Ariz. 83, ¶ 5, 50 P.3d at 834. Heat-of-passion manslaughter, however, is "unusual"; rather than deleting an element of the greater offense of second-degree murder, the statute "specifies a different circumstance as a requirement to find the lesser offense." *Id.* ¶ 6. It is proper for the trial court to instruct the jury on every degree of homicide supported by the evidence. *See State v. Malloy*, 131 Ariz. 125, 129, 639 P.2d 315, 319 (1981); *see also* Ariz. R. Crim. P. 23.3. And in Arizona, homicide includes first-degree murder, second-degree murder, manslaughter, and negligent homicide. A.R.S. § 13-1101(2).

¶17 Contrary to Swihart's contention in his motion for a new trial, the "sudden quarrel manslaughter charge" did not "constitute[] an amendment to the indictment." The indictment charged Swihart with first-degree murder and also purported to "put [him] on notice" that the state may seek "lesser included instructions and jury verdict

forms" on second-degree murder and manslaughter.[2] Regardless of Swihart's argument concerning the relationship between second-degree murder and heat-of-passion manslaughter, manslaughter is a lesser-included offense of first-degree murder—the offense with which he was charged. *See State v. White*, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985) (recognizing manslaughter as lesser-included offense of murder). And *Peak*, although recognizing the unique relationship between second-degree murder and heat-of-passion manslaughter, implicitly confirms manslaughter is a "lesser offense" of the "greater offense" of second-degree murder. *Peak*, 203 Ariz. 83, ¶ 6, 50 P.3d at 834. Therefore, Swihart was convicted of an offense included in the original offense charged, and the trial court did not abuse its discretion in denying his motion for a new trial. *See Sanders*, 115 Ariz. at 290, 564 P.2d at 1257.

Motion to Preclude Evidence

¶18 In the hours before the shooting, Swihart and N. exchanged numerous threatening text messages between their cellular telephones. Swihart and the state first examined the contents of the cellular telephones at an "evidence viewing" on December 22, 2009—fourteen days before the trial was scheduled to begin. Swihart immediately moved to preclude evidence of the statements on N.'s telephone attributable to him, arguing the state had failed to disclose the statements timely as required by Rule 15.1, Ariz. R. Crim. P. The state urged that, if any sanction was necessary, a continuance

[2]The test for whether an offense is lesser included can be met when the indictment describes the lesser offense, even if it does not necessarily constitute a part of the greater offense. *See State v. Brown*, 195 Ariz. 206, ¶ 5, 986 P.2d 239, 240-41 (App. 1999).

would be the most "fair and just outcome given the significance of the new information." On December 29 the court accepted the parties' December 23 stipulation to continue the trial for three weeks to January 26, 2010[3] but denied the motion to preclude, finding "the information sought by [Swihart] was generally known to [him]" and "[t]he phone was available for viewing and examination."

¶19 On appeal, Swihart argues the trial court abused its discretion by failing to preclude the evidence. Rule 15.1(b)(2) requires the state to disclose "[a]ll statements of the defendant" within the prosecutor's possession or control. *See also* Ariz. R. Crim. P. 15.1(f)(2) (extending obligation to information in possession or control of law enforcement). The information must be disclosed within thirty days after arraignment. Ariz. R. Crim. P. 15.1(c)(1). Rule 15.7, Ariz. R. Crim. P., authorizes a trial court to sanction a party who does not disclose relevant material timely. The decision whether to impose sanctions for late disclosure and which sanctions to impose is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Moody*, 208 Ariz. 424, ¶ 114, 94 P.3d 1119, 1149 (2004).

¶20 Swihart argues "the only appropriate sanction available to the trial court . . . was preclusion of the evidence." However, preclusion is "'a sanction of last resort'" and will be imposed only if less severe sanctions are not applicable. *Id.*, *quoting State v. Talmadge*, 196 Ariz. 436, ¶ 17, 999 P.2d 192, 196 (2000). When deciding whether to preclude evidence, the court must inquire into the relevant circumstances to determine

[3]The trial began February 2, 2010.

whether less stringent sanctions may be used. *See State v. Armstrong*, 208 Ariz. 345, ¶ 41, 93 P.3d 1061, 1070 (2004) (court should consider importance of evidence, whether violation result of bad faith and results in surprise and prejudice). Even assuming arguendo a disclosure violation occurred here, we will not find the trial court abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *Id.* ¶ 40.

¶21 Swihart does not provide any authority supporting his contention that preclusion was required under these circumstances. He compares the circumstances here to those in *State v. Purcell*, 117 Ariz. 305, 572 P.2d 439 (1977). In that case, the trial court had precluded an amended transcript of the defendant's statement to police that the defense had not received until the first day of trial. *Id.* at 310, 572 P.2d at 444. In response to the defendant's argument that preclusion of the amended transcript was an inadequate remedy, our supreme court held preclusion adequately protected the defendant's rights. *Id.* at 310-11, 572 P.2d at 444-45. The court in *Purcell* was not presented with the question of whether a lesser sanction would have been adequate or whether preclusion is required in all cases of late disclosure.[4]

[4]Even if the same issue had been presented in *Purcell*, whether preclusion is warranted depends on the circumstances of each case. *See Armstrong*, 208 Ariz. 345, ¶ 41, 93 P.3d at 1070. The court in *Purcell* noted that unfair surprise had occurred, 117 Ariz. at 311, 572 P.2d at 445, whereas the trial court's findings in this case suggest Swihart was not or should not have been surprised unfairly by the existence of the text messages.

¶22 Swihart also cites *State v. Krone*, 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995), to support the proposition that precluding evidence for a discovery violation "would have been an appropriate sanction." *Krone* determined the trial court "should have either granted a continuance or precluded the [evidence]," and did not hold that preclusion would have been the only appropriate remedy. *Id.* Neither of those cases requires preclusion in this case.

¶23 In the trial court, the state urged a continuance would be the most "fair and just outcome given the significance of the new information." Swihart responded that the continuance he had agreed to would be insufficient because it would not provide him the opportunity to accept a plea offer that since had been withdrawn.[5] On appeal, however, Swihart does not challenge the court's decision to deny the motion to reinstate the plea and does not argue the continuance was insufficient for that reason. He offers no other reason the continuance was an insufficient remedy.

¶24 Swihart also argues the trial court's findings "do not withstand scrutiny." The trial court is in the best position to make factual findings, and we defer to those findings unless they are clearly erroneous. *See State v. O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d 1074, 1077-78 (App. 2002). The state argued it never had possessed the text messages in any written format, but evidence of the telephones had been disclosed from "day one" in its photographs, police reports, and property reports—some of which were

[5]Swihart argued the only appropriate remedy was for the state to reinstate the previous plea offer and stated that preclusion would be insufficient because the evidence would remain admissible for purposes of rebuttal.

referred to in an exhibit list it had attached to its answer to the motion.[6] Swihart did not dispute the phone had been available for examination. The state also noted the defendant was in the best position to know the content of his own statements, and although Swihart argued his memory of the text messages was not reliable because of drinking and drug use, we defer to the trial court's resolution of conflicting evidence.[7] *See id.* Therefore, the court's findings that "the information sought by [Swihart] was generally known to [him]" and "[t]he phone was available for viewing and examination" are reasonably supported by the record.

¶25 Furthermore, Swihart has failed to explain why a continuance was inadequate to remedy any late disclosure here. *See Moody*, 208 Ariz. 424, ¶ 114, 94 P.3d at 1149. The trial court inquired into the relevant circumstances at the hearing on the motion to preclude, and the information presented to the court reasonably supports a determination that preclusion was not required to remedy any alleged disclosure

[6]On appeal, the state submitted supplemental materials to support this statement further. However, we disregard those materials because they were not presented in the trial court. *See State v. Martinez*, 134 Ariz. 119, 120, 654 P.2d 53, 54 (App. 1982). We do consider the transcript of the hearing on the motion to preclude, which was submitted with the supplemental materials, as both parties agree it should be part of the record on appeal.

[7]In his reply brief, Swihart argues he did not have knowledge of all of the evidence because "text messages sent by [Swihart] were only a fraction of the text-message evidence at issue." However, in the trial court, Swihart moved to preclude only the "statements of [Swihart] recorded on deceased victim [N.'s] cell phone," and argued at the hearing the state was "required to disclose defendant's statements much earlier." In his opening brief, he reiterates that the state's violation consisted of failing to disclose "statements of the defendant" as required by Rule 15.1. Therefore, the messages sent by Swihart constitute the entirety of the evidence at issue on appeal.

violation. *See Armstrong*, 208 Ariz. 345, ¶ 41, 93 P.3d at 1070. Accordingly, we conclude the court did not abuse its discretion in denying Swihart's motion to preclude this evidence. *See Moody*, 208 Ariz. 424, ¶ 114, 94 P.3d at 1149.

Disposition

¶26 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge